



POLICE DEPARTMENT CITY OF NEW YORK

December 29, 2016

MEMORANDUM FOR: Police Commissioner

Re: Lieutenant Jorge Tavarez
Tax Registry No. 931303
6 Precinct
Disciplinary Case No. 2015-12988

Charge and Specification:

1. Said Lieutenant Jorge Tavarez on or about June 29, 2014, at approximately 1700 hours, while assigned to the 6th Precinct and on duty, in the vicinity of Christopher Street and Weehawken Street, New York County, did wrongfully use force against Person A, in that he threw Person A to the ground.

P.G. 203-11 – USE OF FORCE

Appearances:

For CCRB-APU: Jonathan Fogel, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, New York 10007

For Respondent: James Moschella, Esq.
Karasyk & Moschella, LLP
233 Broadway, Suite 2340
New York, New York 10279

Hearing Date:

September 30, 2016

Decision:

Respondent is found Not Guilty

Trial Commissioner:

ADCT Robert W. Vinal

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on September 30, 2016. Respondent, through his counsel, entered a plea of not guilty to the subject charge. CCRB called Nilsa Martinez as a witness and offered in evidence the out-of-court statement of Person A. Respondent called Police Officer Nixon Douglas as a witness and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Not Guilty.

FINDINGS AND ANALYSIS

It is not disputed that on June 29, 2014, Respondent was on duty, in uniform, assigned to the 6 Precinct, supervising officers performing crowd control safety duties at a Gay Pride event ("the event") that was being held at a pier on the west side of lower Manhattan. Respondent apprehended Person A after he climbed over a metal police barricade that had been set up at Christopher Street and Weehawken Street.

Person A was interviewed at CCRB on August 8, 2014 (CCRB Ex. 1). Person A, who was 24-years-old at the time of this interview, stated that he and some co-workers had attempted to go to the event, but that when they arrived at the intersection of Christopher Street and the West Side Highway and saw that a very large crowd had gathered there to cross the highway to the pier where the event was being held, they decided to go somewhere else. They walked to the intersection of Christopher Street and Weehawken Street where they decided that they would all climb over a five-foot high metal police barricade. Person A was the first to

climb over. Person A stated that he knew that climbing over the police barricade "was wrong" but he did it anyway. (CCRB Ex. 1 p. 4).

When he reached the other side of the barricade, Respondent "took me by my shirt and swung me to the floor." (CCRB Ex. 1 p. 4-5). Person A's stated that his mouth "was foaming and my eyes was rolling back and I was shaking." He believed that he was having an epileptic seizure. (CCRB Ex. 1 p. 5). Although he was "not a hundred percent sure that it was a seizure, [REDACTED]" He later concluded that he had suffered an epileptic seizure because "my co-workers...told me after, 'cause I didn't realize anything that was happening because it was so hot that day that I fell into a seizure."

He stated that when he "came back to reality after the epileptic attack," he saw that his elbow was bloody and he told Respondent, "I need an ambulance." Respondent "pulled me up" off the ground. Person A described himself as "so dazed out I didn't know what was going on." Respondent then "came in front of my face" and said, "Arrest him." When Respondent "came in my face I kind of pushed him away...because I was just getting back to reality and everything. That's when he flung me again on the floor." Then "five officers jumped" on him.

Later during his interview, Person A stated that after he climbed over the barricade and reached the other side, Respondent grabbed the back of his shirt by the shoulder area, "put his arms around me and I fell on the floor." (CCRB Ex. 1 p. 15). He landed on his back and lost consciousness. (CCRB Ex. 1 p. 16). When Respondent pulled him up to his feet, a female officer whose last name was Pena asked him if he was diabetic. (CCRB Ex. 1 p. 18) After he told Respondent, "Can you move out of my way," and then "pushed him away," Respondent grabbed him by his neck and flung him to the ground. He landed on his stomach. (CCRB Ex. 1 p. 19-20). While he was face down on the ground, he was handcuffed. (CCRB Ex. 1 p. 22). He

was then transported to the 6 Precinct. (CCRB Ex. 1 p. 28-29). Person A was charged with Disorderly Conduct and Resisting Arrest. When he appeared in court, the judge told his attorney to make a motion to dismiss the charges in part [REDACTED] (CCRB Ex. 1 p. 33-34).

Nilsa Martinez testified that on June 29, 2014, she was standing at the intersection of Christopher Street and Weehawken Street, waiting to be allowed to cross the West Side Highway to the pier where the event was being held, when she saw three "boys" climbing over a barricade. She saw Respondent, who she identified in the Trial Room, run over to the barricade. He "attacked" the "last kid" of the three who had climbed over the barricade by grabbing his waist area with both of his hands. Martinez testified that Respondent then "body slammed" the boy's whole body onto the ground. (Tr. 27) The boy landed on his left side and she saw a bruise on his right elbow that was bleeding. (Tr. 40). Martinez demonstrated that Respondent had placed one of his hands around the boy's waist and then "threw him on the ground" and then immediately handcuffed him. (Tr. 29, 64). Martinez approached Respondent and told him, "I saw what you did." He replied, "You didn't see what the kid did to me." Martinez responded, "The kid didn't do anything to you." Martinez called the Civilian Complaint Review Board (CCRB) to report what she had seen.

Martinez confirmed that this was the first time that she had ever personally seen a police officer use force to arrest a civilian. (Tr. 44). Martinez also confirmed that the last of the three boys who had climbed over the barricade was walking away through the cordoned-off area when he was grabbed by Respondent who "knocked him to the ground." (Tr. 53-55).

[REDACTED]

[REDACTED]

Respondent testified that he saw Person A and two other individuals climb over the metal police barricade. The two other individuals stopped but Person A started to walk away. Respondent spoke to Person A to try to get his attention but he ignored him and continued walking. Respondent testified that as Person A walked past him he extended his arm and touched Person A's shoulder. Person A "immediately collapsed right where he was standing." (Tr. 98). Because Person A closed his eyes tightly, Respondent believed that Person A was "faking" a medical condition. (Tr. 101). One of Person A's co-workers said that he might be diabetic but he did not know for sure.

Suddenly Person A "just sprung back up; stood up like nothing happened." (Tr. 103). Respondent told Person A and the two other individuals to leave the area. The two other individuals left the area but Person A refused to leave, even though Respondent asked him several times to leave. (Tr. 103-104). Respondent then decided to issue Person A a summons and he asked him to produce ID. Person A told Respondent, "Why? I don't have to do what you say." Respondent decided to arrest Person A. (Tr. 104-105). Respondent then tried to get hold of Person A's arm to handcuff him, but he pulled it away and pushed Respondent on his chest to push him away. (Tr. 137). Respondent then grabbed Person A's arm but he then lost his balance and they both fell to the ground. (Tr. 106). He did not body slam Person A onto the ground. Officers came to Respondent's assistance and Person A was handcuffed. (Tr. 107). Since Person AA refused to stand up, he had to be carried to a police vehicle to be transported to the 6 Precinct. (Tr. 108). [The arrest mug shot of Person A was admitted into evidence as RX A]. Respondent recalled that Martinez approached him and asked why Person A was being arrested. She then told him that she was going to make a complaint. (Tr. 135).

Police Officer Nixon Douglas testified that he was assigned to transport Person A to the 6 Precinct. Douglas testified that he did not observe any physical injuries to Person A and that he did not complain of any injury and did not request medical attention.

Analysis

Respondent is charged with wrongfully using force against Person A in that he threw him to the ground. After evaluating the trial record in its entirety, I find Respondent not guilty.

Patrol Guide Procedure No. 203-11 delineates the standards to be followed when the use of force is necessary to achieve legitimate police goals. It specifically requires that members of service "at the scene of an incident" use the "minimum force" needed. This procedure also warns uniformed members of service that "excessive force will not be tolerated."

The question presented here is whether the CCRB Administrative Prosecutor met his burden of proving that Respondent wrongfully used force against Person A.

The transcript of Person A's interview at CCRB on August 8, 2014 (CCRB Ex. 1) was offered as hearsay evidence at this trial. Although hearsay is admissible at Department disciplinary trials and may form the sole basis for making findings of fact,¹ hearsay evidence will not support a finding of guilt in a disciplinary trial if statements made by the hearsay declarant are found to be incredible.² I find some of Person A's hearsay declarations to be incredible.

At his CCRB interview, Person A asserted that he had suffered an "epileptic attack" at the scene as a result of Respondent's use of force against him. (CCRB Ex. 1 p. 5, 16). However, the 24-year-old Person A incredibly claimed that this was the very first time that he had ever suffered an epileptic seizure. He admitted that he was "not a hundred percent sure that it was a seizure [REDACTED]" so he

¹ RCNY Title 38, 15-04(e)(1).

² *Eppler v. Van Alstyne*, 93 AD2d 930, 462 NYS2d 320, 1983 NY App Div LEXIS 17824.

assumed that he had suffered an epileptic seizure because “my co-workers...told me after, ‘cause I didn’t realize anything that was happening because it was so hot that day, that I fell into a seizure.” (CCRB Ex. 1 p. 4). Thus, even though Person A implicitly acknowledged that “because it was so hot that day,” he may have simply become faint from the heat, based on what his co-workers told him afterwards he simply assumed that he had suffered a “seizure” as the result of an “epileptic attack.”

Person A’s hearsay must also be examined in light of his admissions that after Respondent took him down to the ground the first time, he “didn’t realize anything that was happening” and that he was “so dazed out I didn’t know what was going on.” [REDACTED] [REDACTED]

[REDACTED]

Finally, since Person A did not appear to testify, Respondent’s attorney did not have the opportunity to question him about whether his statements at CCRB were based on his own recollection or what his co-workers told him they had seen. Respondent’s attorney also did not have the opportunity to question him as to whether he had embellished his version of this event at his CCRB interview based on his pecuniary interest in his civil suit.

Based on the above, I find that I cannot rely on anything that Person A said at his CCRB interview unless it constitutes an admission against his own interest.

As to Martinez’s testimony, I find it significant that this was the first time that she had ever personally seen a police officer use any force to arrest a civilian. More significantly, it is clear that Martinez did not witness the entire physical interaction between Respondent and Person A because she testified that she told Respondent that, “The kid didn’t do anything to you.” Thus, it is clear that she did not see Person A push Respondent, even though it is not

disputed that Person A did push Respondent. Person A corroborated Respondent's claim that he was pushed by Person A admitted that he "pushed him away."

Since Respondent was arresting Person A, he had the right to use the force that was necessary to handcuff Person A who resisted by pushing Respondent. I find that the CCRB Administrative Prosecutor did not meet his burden of proving that the force that Respondent used against Person A constituted wrongful force.

These findings are consistent with previous disciplinary decisions. In Case No. 2014-12377 (signed Nov. 20, 2015), an officer who was charged with using excessive force in arresting a suspect was found not guilty. In that case, the officer body slammed a suspect who was resisting the officer's demands that he cooperate in being handcuffed.

More recently, in Case No. 2013-10647 (signed Jan. 8, 2016), an officer was charged with using excessive force in arresting a suspect. The officer grabbed and held a suspect by the collar, forcibly pushed him against a wall, and lifted him off of his feet. The Trial Commissioner recommended that the officer be found guilty. However, the Police Commissioner, after analyzing the circumstances of the case, disapproved the Trial Commissioner's guilty finding and determined Respondent to be Not Guilty.

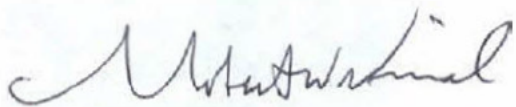
Therefore, it is recommended that Respondent be found Not Guilty.

Respectfully submitted,

APPROVED

MAY 23, 2017


JAMES P. O'NEILL
POLICE COMMISSIONER



Robert W. Vinal
Assistant Deputy Commissioner Trials